

Ms. Patricia Silvey
Acting Director
Office of Standards, Regulations and Variances
1100 Wilson Blvd., Rm 2350
Arlington, Va.
22209-3939

Received 10/23/06
MSHA/OSRV

Dear Ms. Silvey,

I am submitting these comments on behalf of Peabody Energy concerning the proposed changes to the violation assessment procedures. Peabody is the largest coal company in the world and as such, we have several issues that we wish to be considered by the agency before moving forward on this new rule.

The impact of the recent disasters in the industry has been dramatic. Even though our mines were not involved, the resultant Emergency Standards and the Miner Act has required our company to spend over \$20 million dollars to comply. We have done so willingly and have participated in efforts to find new technologies to solve continued problems. The increase in the fines will in no way influence or primary belief to provide our miners with a safe and healthy workplace. To infer that it would have that effect is and insult to all companies that operate mines in the safest manner possible.

It is well documented that available resources are already being taxed by the actions of the agency, especially in the larger mines. To make this matter worse by further removing resources from our efforts is absolutely the wrong thing to do. The agency already has sufficient tools to get the attention of those operators who would allow their managers to place their miners in jeopardy. The fact that MSHA has been reluctant to use those tools has now resulted in an effort to penalize all operators without consideration of the supposed disparity in the approaches to safety.

It is our hope that you will consider our points and we ask that these misguided regulations be corrected or retracted.

Sincerely,
David Beerbower
VP- Safety
Peabody Energy

AB51-COMM-30

Comments submitted by David Beerbower on behalf of Peabody Energy concerning a proposed rule RIN1219-AB51

Large mine negative bias

On page 53056 of the preamble, MSHA states that “Congress intended that the imposition of civil penalties would induce mine operators to be proactive in their approach to mine safety and health, and take necessary action to prevent safety and health hazards before they occur.” The agency has continually noted that the sector of the industry that concerns them most when it comes to violations, hazards and fatalities, are the small mine operators. In fact, the agency has created a small mines task group to deal with their specific concerns. The proposed changes to the assessment procedure fail to recognize this and they favor the same segment that they claim to be problematic:

- Small mines already receive preferential treatment in that fines can be reduced if “the penalty would adversely affect its ability to continue in business.”
- Large mines receive a disproportionate number of inspection hours and as a result, they are issued more citations than small mines.
- Large mines will be assigned twice as many points because of their size than they would have under the existing rule, further extending the bias against them in the assessment process.
- If the mines are part of a large controlling entity, the points assigned are doubled in the proposed rule versus the existing rule. This again increases the bias against large operators.
- It is a well established fact that large UMWA mines receive more inspections and more citations than small, non-union operations. Until the number of inspection days per MMU are normalized, there can be no equal treatment across the industry.

The agency states, “The proposed changes are intended to induce greater mine operator compliance with the Mine Act and MSHA’s safety and health standards, thereby improving safety and health for miners.” There is absolutely no evidence to support this statement, in

fact, a report by a consultant hired by MSHA just a few years ago found very little if any correlation between MSHA citation activity and injury incidence rates.

Method for Determining the Size of Coal Mines

The size of coal mines and their controlling entities is based on tons of coal produced, while M/NM mines and independent contractors are measure by the number of manhours worked. The number of manhours is a better measure for coal mines and is more equitable for large surface mines and highly productive underground longwall mines.

MSHA's Stated Purpose of Increased Assessments

On page 53057, it states, "MSHA believes penalties assessed under the existing regulations are often too low to be an effective deterrent for noncompliance at some of the largest operations." This is in direct opposition to MSHA public statements that large, well capitalized mines and companies are far and away the safest in the industry. The way this preamble sounds, the large mines are ignoring assessments and operating mines in defiance of the rules. This is absolutely untrue and they know better. Large companies have well developed safety processes and they are leading the way for new improvements in miner safety and health. This is being done through commitment to testing new technologies in partnership with MSHA and NIOSH. Increasing fines will only divert resources away from these efforts and create a more adversarial relationship between operators and the regulatory agency. The end result will likely be less cooperation and fragmentation of the existing efforts.

Variability of Inspector Performance

MSHA inspectors are being handed the weapons with which they could bring any operation to its knees for subjective reasons, including personal grudges, past employer revenge, union vs. company bias, etc. This can be done with little or no recourse by the operator. The resultant number of citations issued is more under the control of the inspector and the miner's representatives than it is of the operator. To support this, just look at the numbers of citations being issued to large union operations by former coal company hourly employees now working as MSHA inspectors. This is not true in all cases, but the fact that it does exist makes this a very great concern.

Repeat Violations of the Same Standard

Repeat violations of the same standard are not necessarily indicative of abuse by the operators. All inspectors have pet issues that they like to bring to bear on operators. If a large mine has miles of conveyors,

then it only makes sense that the potential for violations for coal accumulations is higher. Some of the standards are very broad and cover conditions that could be found in several areas of an underground mine. The agency already has the means to address high negligence or reckless disregard by an operator. The repeat violation component should be eliminated, but if it survives the comment process, we believe it should not include non-S&S citations. These are not hazards and should not be included in this calculation. The number of inspection days definitely should be taken into consideration.

Levels of Negligence

The dramatic increase in points across the five levels of negligence only adds to the arbitrary nature of these categories. These are generally the areas that create the greatest disagreements between operators and the inspectors. If these changes are affirmed, there will be a dramatic increase in citations and assessments that will be contested. Due to the existing backlog in conferencing citations, the process will be overwhelmed and many cases will go directly to court, thus diverting resources away from the safety work at the mine level. Companies will have to challenge higher assessments because of the potential they have to negatively impact the profitability of the operation.

Elimination of the Single Penalty

Many citations are issued for paperwork violations and minor infractions of the rules. As the regulations become increasingly prescriptive, non-S&S violations have risen to over 60% of the total citations being issued. Due to the current single penalty assessment, most companies choose not to contest them because of the costs to do so. If these are introduced to the regular assessment process, many of these will be challenged, further congesting the process. I have attached an exhibit from one of our mines that shows how a non S&S citation could cost our company \$4000 as opposed to the previous \$72. Obviously, we would have to take such an assessment to court to seek reversal. Operators and inspectors would have to spend huge amounts of time in preparing information for these appeals, and the result will be less time spent on real safety work at the mine level.

Reduction of the 30% Credit for Good Faith Abatement

To reduce the deduction for good faith abatement to 10% only further increases the adversarial relationship between the industry and MSHA. This says that no matter how hard you try to do the right thing, you will not be recognized for your efforts. In a time when the agency should be expanding and encouraging abatement efforts, they have chosen to do just the opposite.

Reduction in the Time Allowed for Notice of Contest

Five days removed from the operator's time allowed for notice of contest will only result in an increase of citations being challenged. This time is currently being used to investigate the cause of a citation and to determine what steps may be required for correction. If this process is short circuited, many citations will be contested when they may not have normally been pressed forward. It is interesting that MSHA chose not to shorten their timeframe to conduct conferences on these citations. It is not unusual for the process to be 3-6 months behind schedule, and it will only get worse if this proposal is affirmed. Legal costs will soar for both operators and MSHA.

Effects of Increased Assessments

The agency believes that a 10% increase in fines will result in a 3% reduction in the probability of citations occurring as companies get serious about compliance. As stated before, there is no basis in fact to make that statement. The reality has been that recent increases in the fines have actually resulted in a dramatic increase in the number of citations being issued. MSHA has admitted this on page 53056 of the preamble when it stated, "The number of citations for violations of MSHA's standards and regulations has been on the rise since 2003."

Proposed MSHA Violation Assessments

Comments: In the event that MSHA prevails and the assessments rise to their proposed levels our industry is looking at an extremely large increase in penalties. If the single penalty assessments are eliminated and penalties are based on points large operators will be at an extreme disadvantage due to their sheer size and production.

Typical 75.400 accumulation citation - Non S&S

<u>Criteria:</u>	<u>Statistics</u>	<u>Proposed Points</u>
Annual tonnage of mine	Over 2 million tons	20
Size of controlling entity	Over 10 million tons	5
VPID over last 15 months	Exceeds 2.1	25
Repeat violations of same std.	More than 20 in last 15 months	20
Negligence	Moderate	20
Likelihood	Unlikely	10
Severity	Lost work days or restricted duty	5
Persons potentially affected	One person	1
		Total Points: 106
		Proposed Penalty: \$4,440
		10% Good Faith deduction: -444
		\$3,996

Typical 75.400 accumulation citation - S&S - Moderate Negligence

<u>Criteria:</u>	<u>Statistics</u>	<u>Proposed Points</u>
Annual tonnage of mine	Over 2 million tons	20
Size of controlling entity	Over 10 million tons	5
VPID over last 15 months	Exceeds 2.1	25
Repeat violations of same std.	More than 20 in last 15 months	20
Negligence	Moderate	20
Likelihood	Reasonably likely	30
Severity	Lost work days or restricted duty	5
Persons potentially affected	One person	1
		Total Points: 126
		Proposed Penalty: \$21,993
		10% Good Faith deduction: -2199
		\$19,794

Typical 75.400 accumulation citation - S&S - High Negligence

<u>Criteria:</u>	<u>Statistics</u>	<u>Proposed Points</u>
Annual tonnage of mine	Over 2 million tons	20
Size of controlling entity	Over 10 million tons	5
VPID over last 15 months	Exceeds 2.1	25
Repeat violations of same std.	More than 20 in last 15 months	20
Negligence	High	35
Likelihood	Reasonably likely	30
Severity	Lost work days or restricted duty	5
Persons potentially affected	One person	1
		Total Points: 141
		Proposed Penalty: \$60,000
		10% Good Faith deduction: -6000
		\$54,000

Cheapest typical Non S&S citation

<u>Criteria:</u>	<u>Statistics</u>	<u>Proposed Points</u>
Annual tonnage of mine	Over 2 million tons	20
Size of controlling entity	Over 10 million tons	5
VPID over last 15 months	Exceeds 2.1	25
Repeat violations of same std.	Five or fewer in last 15 months	0
Negligence	Moderate	20
Likelihood	Unlikely	10
Severity	Lost work days or restricted duty	5
Persons potentially affected	One person	1
		Total Points: 86
		Proposed Penalty: \$897
		10% Good Faith deduction: -90
		\$807